

Before the  
Federal Communications Commission  
Washington, D.C. 20554

In the Matter of	)	
	)	
Indigo Wireless, Inc.	)	File No.: EB-SED-13-00009306 <sup>1</sup>
	)	
	)	NAL/Acct. No.: 201132100018
	)	
	)	FRN: 0009120999

**FORFEITURE ORDER**

**Adopted: June 20, 2014**

**Released: June 20, 2014**

By the Acting Chief, Enforcement Bureau:

**I. INTRODUCTION**

1. We impose a penalty of \$39,000 against Indigo Wireless, Inc. (Indigo Wireless) for failing to offer to consumers the required number or percentage of digital wireless handset models that met or exceeded the radio frequency interference standards for hearing aid compatibility in 2009. The Commission’s hearing aid compatibility rules were adopted to enhance the ability of consumers with hearing loss to access digital wireless telecommunications. In adopting the hearing aid compatibility rules, the Commission recognized the immediate need for such access and determined that individuals with hearing loss should not be denied the public safety and convenience benefits of digital wireless telephones. This need has become more critical, given the increased demand for hearing-aid compatible handsets. It is therefore necessary to continue our strong enforcement efforts in this area. Here, notwithstanding a violation of our hearing aid compatibility rules, Indigo Wireless urges us to cancel the proposed forfeiture based primarily on its asserted belief that it made good efforts to otherwise comply with the requirements. As discussed below, we find this and other arguments insufficient to warrant cancellation or reduction of the forfeiture.

**II. BACKGROUND**

2. On December 30, 2010, the Enforcement Bureau (Bureau) issued a Notice of Apparent Liability for Forfeiture (*NAL*) against Indigo Wireless in the amount of \$39,000 for its apparent willful and repeated violation of Section 20.19(c)(3)(ii) of the Commission’s rules (Rules)<sup>2</sup> by failing to offer the required number or percentage of hearing aid-compatible handset models that met or exceeded the M3 rating for nine months during the 2009 reporting period.<sup>3</sup>

3. On January 28, 2011, Indigo Wireless filed a response to the *NAL* requesting cancellation of the proposed forfeiture because (it insists) it reasonably believed that it was in compliance with the

<sup>1</sup> The investigation was initiated under EB-10-SE-113 and subsequently assigned File No. EB-SED-13-00009306. Any future correspondence with the Commission concerning this matter should reflect the new case number.

<sup>2</sup> 47 C.F.R. § 20.19(c)(3)(ii).

<sup>3</sup> See *Indigo Wireless, Inc.*, Notice of Apparent Liability for Forfeiture, 25 FCC Rcd 17821 (Enf. Bur. 2010) (*NAL*). The *NAL* includes a more complete recitation of the facts and history of this case and is incorporated herein by reference.

Rules and that any finding of noncompliance with the Rules was not willful.<sup>4</sup> Further, Indigo Wireless argues that the proposed forfeiture is excessive, arbitrary, and would cause financial hardship to the company.<sup>5</sup> Indigo Wireless also argues that the Bureau should downwardly adjust the proposed forfeiture because the violation was minor; that it made good-faith efforts to comply with the hearing aid compatibility requirements; and that it has a history of compliance.<sup>6</sup> On March 14, 2011, Indigo Wireless submitted a Supplemental NAL Response in further support of its request for cancellation of the forfeiture.<sup>7</sup>

### III. DISCUSSION

4. The proposed forfeiture in this case was assessed in accordance with Section 503(b) of the Communications Act of 1934, as amended (Act),<sup>8</sup> Section 1.80 of the Rules,<sup>9</sup> and the Commission's *Forfeiture Policy Statement*.<sup>10</sup> In assessing forfeitures, Section 503(b)(2)(E) of the Act requires that we take into account the "nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require."<sup>11</sup> As discussed below, we have fully considered Indigo Wireless's NAL Response and Supplemental NAL Response in light of these statutory factors and find no basis for cancellation or reduction of the proposed forfeiture. In this Forfeiture Order, we affirm the NAL's finding that Indigo Wireless willfully and repeatedly violated Section 20.19(c)(3)(ii) of the Rules by failing to offer to consumers for nine months the required number or percentage of digital wireless hearing aid-compatible handset models that met or exceeded the M3 rating.

5. In its NAL Response, Indigo Wireless argues that it did not violate Section 20.19 of the Rules because it "reasonably believed (and continues to believe) that the Pantech c810 was hearing-aid compatible" based on Internet sources.<sup>12</sup> Indigo Wireless argues that determining hearing-aid compatibility using official FCC resources is "difficult to impossible" and, therefore, Indigo Wireless's

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<sup>4</sup> Response to Notice of Apparent Liability for Forfeiture, 1–6, 8–9 (Jan. 28, 2011) (on file in EB-SED-13-00009306) (NAL Response).

<sup>5</sup> *See id.* at 8.

<sup>6</sup> *See id.* at 8–10. We note that Indigo Wireless argues that its violation was, at best, only "*de minimis*." *Id.* at 9. The term "*de minimis*," however, has a specific meaning in the context of the hearing-aid compatibility rules, and Indigo Wireless does not claim that it offers a *de minimis* number of handset models. *See* 47 C.F.R. § 20.19(e). To alleviate any potential confusion, we are using the word "minor" to more accurately describe Indigo Wireless's argument about the extent of the violation.

<sup>7</sup> The Supplemental NAL Response identified a Consent Decree between the Bureau and Pantech Wireless, Inc. (Pantech), involving Pantech's failure to file hearing aid compatibility reports that Indigo Wireless claims it "might have consulted" for information on the Pantech c810's hearing-aid compatibility rating in preparation for filing its hearing aid compatibility status report for 2009. Letter from James M. Smith, Esq., Davis Wright Tremaine LLP, Counsel to Indigo Wireless, Inc., to JoAnn Lucanik, Deputy Chief, Spectrum Enforcement Division, FCC Enforcement Bureau (Mar. 14, 2011) (on file in EB-SED-13-00009306) (Supplemental NAL Response) (citing *Pantech Wireless, Inc., a U.S.-Based Subsidiary of Pantech Co.*, Order and Consent Decree, 26 FCC Rcd 1713 (Enf. Bur. 2011)). *See infra* note 18.

<sup>8</sup> 47 U.S.C. § 503(b).

<sup>9</sup> 47 C.F.R. § 1.80.

<sup>10</sup> *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087 (1997) (*Forfeiture Policy Statement*), *recons. denied*, Memorandum Opinion and Order, 15 FCC Rcd 303 (1999).

<sup>11</sup> 47 U.S.C. § 503(b)(2)(E).

<sup>12</sup> NAL Response at 6–7.

reliance on Internet sources should be deemed reasonable.<sup>13</sup> As such, Indigo Wireless argues, the Pantech c810 should be considered hearing aid compatible.<sup>14</sup> We are not persuaded by this line of argument. Whatever Indigo Wireless's belief, it is indisputable that the Pantech c810 was not hearing aid-compatible according to Commission records.<sup>15</sup> As noted in the *NAL*, it is well established that a violator's erroneous beliefs are not a mitigating factor warranting cancellation of a forfeiture.<sup>16</sup> Furthermore, despite its insistence, we find that Indigo Wireless's efforts to ascertain ratings information (by relying on third party internet sources) do not reflect sufficient diligence to excuse the violation. In this regard, we note that the Commission's Equipment Authorization System is the most reliable source for information on a handset model's hearing aid compatibility rating. The Equipment Authorization System is an electronic database of all equipment certified under Commission authority. The database identifies the hearing aid compatible rating of each handset model by FCC ID, as reported by the handset manufacturer in test reports submitted to the Commission at the time of an equipment authorization or of any modification to such authorization.<sup>17</sup> Despite its assertion of the difficulties with FCC databases, there is no evidence to reflect that the relevant databases at the time were unreliable.<sup>18</sup> Accordingly, we conclude that Indigo Wireless violated Section 20.19(c)(3)(ii) of the Rules because it failed to offer the required number of M3-rated handset models from March through July of 2009 and from September through December of 2009.<sup>19</sup>

6. We also reject Indigo Wireless's argument that its noncompliance was not willful. Specifically, Indigo Wireless argues that it did not knowingly offer less than the minimum required number of handset models and therefore it did not act willfully.<sup>20</sup> As noted in the *NAL*, however, willful noncompliance is not predicated on a finding of knowledge or intent to violate the law.<sup>21</sup> Furthermore,

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<sup>13</sup> *Id.* at 5–6.

<sup>14</sup> *See id.* at 7.

<sup>15</sup> *See NAL*, 25 FCC Rcd at 17823, para. 4, n.13. Notably, Indigo Wireless expressly admits that even accepting its argument about the Pantech c810 (which we do not as explained herein), it was not compliant with the hearing-aid compatibility Rules in December 2009. *See NAL Response* at 7 (“Based on that information [about the Pantech c810], even if no other handsets cited in the LOI were HAC-compliant, Indigo [Wireless] fully complied with the Commission's rules by offering HAC handsets as 50 percent or more of its sales inventory at all times during 2009 except for one week in December 2009.”); *see also id.* at 7 n.18 (“Adding one handset (i.e., the Pantech c810 Duo) to the number of “Hearing Aid-Compatible Handsets Offered” in column 3 [of the *NAL*] from March through December 2009 yields a percentage of 50% of greater HAC handsets in every month except December.”).

<sup>16</sup> *NAL*, 25 FCC Rcd at 17827, para. 12, n.39 (citing cases).

<sup>17</sup> *See* <http://transition.fcc.gov/oet/ea/fccid/>.

<sup>18</sup> Indigo Wireless's Supplemental *NAL Response* does not alter this conclusion. That Indigo Wireless “might have consulted” another source does not change the fact the Pantech c810 is not hearing-aid compatible according to Commission records, and that, therefore, Indigo Wireless offered fewer than the required number of hearing-aid compatible handset models during the relevant time period. Supplemental *NAL Response* at 2. Indigo Wireless makes no argument that the resources it “might have consulted” show that the Pantech c810 is actually hearing-aid compatible. *Id.*

<sup>19</sup> *See NAL*, 25 FCC Rcd at 17830, Appendix.

<sup>20</sup> *See NAL Response* at 8.

<sup>21</sup> *See NAL*, 25 FCC Rcd at 17827 n.41. Section 312(f)(1) of the Act defines “willful” as “the conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate” the law. 47 U.S.C. § 312(f)(1). The legislative history of Section 312(f)(1) of the Act clarifies that this definition of willful applies to both Sections 312 and 503(b) of the Act, H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982), and the Commission has so interpreted the term in the Section 503(b) context. *See Southern Cal. Broad. Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388, para. 5 (1991), *recons. denied*, 7 FCC Rcd 3454 (1992) (*Southern California*); *see also Telrite Corporation*, Notice of Apparent Liability for Forfeiture, 23 FCC Rcd 7231, 7237, para. 12 (2008); *Regent USA*, Notice of Apparent Liability for Forfeiture, 22 FCC Rcd 10520, 10523, para. 9 (2007).

even if Indigo Wireless were successful in demonstrating that it did not willfully violate the rules, the violation was nevertheless repeated (which Indigo Wireless does not dispute), which is sufficient under Section 503(b)(1)(B) to support the imposition of a forfeiture penalty.<sup>22</sup>

7. We are also unpersuaded by Indigo Wireless's claims that the forfeiture is excessive or that the violation is minor in light of the statute of limitations.<sup>23</sup> A carrier's failure to offer the requisite number or percentage of digital hearing aid-compatible handset models can never be regarded as a minor violation, given the significance of the requirement. In determining the appropriate forfeiture amount for violations of the hearing aid-compatible handset deployment requirements, the Commission considered that these requirements serve to ensure that consumers with hearing loss have access to advanced telecommunications services. In adopting the hearing aid compatibility rules, the Commission underscored the strong and immediate need for such access.<sup>24</sup> As the Commission has explained, the demand for hearing aid-compatible handsets is likely to increase with the public's growing reliance on wireless technology and with the increasing median age of our population.<sup>25</sup> Accordingly, the Commission determined that a base forfeiture amount of \$15,000 per handset model shortfall is necessary to reflect the gravity of the noncompliance.<sup>26</sup> Here, Indigo Wireless was short two handset models in December 2009 (during a period within the applicable statute of limitations), which is the basis of the \$30,000 base forfeiture; and because of the duration of the violation, an upward adjustment of the base forfeiture amount was made.<sup>27</sup> The calculation of the proposed forfeiture was entirely consistent with Commission precedent and not excessive, and Indigo Wireless makes no argument that the violation occurred outside of the statute of limitations.<sup>28</sup>

8. Indigo Wireless also asserts that it has a history of overall compliance with the Rules that warrants cancellation or reduction of the proposed forfeiture.<sup>29</sup> We disagree. When evaluating a request for a forfeiture reduction based on a claim that an individual or entity has not previously violated our

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<sup>22</sup> See *NAL*, 25 FCC Rcd at 17827–28, paras. 13–14; 47 U.S.C. § 503(b).

<sup>23</sup> See *NAL* Response at 9–10. According to Indigo Wireless, its violation should be considered minor because the *NAL* only captured within the one-year statute of limitations the company's handset shortages that occurred December 30–31, 2009. *Id.* at 9.

<sup>24</sup> See *Section 68.4(a) of the Commission's Rules Governing Hearing Aid-Compatible Telephones*, Report and Order, 18 FCC Rcd 16753, 16755, para. 4 (2003).

<sup>25</sup> See *id.* at 16756, para. 5 (noting that approximately one in ten Americans, or 28 million Americans, have some level of hearing loss, that the proportion increases with age, and that the number of those affected will likely grow as the median age increases); see also *Section 68.4(a) of the Commission's Rules Governing Hearing Aid-Compatible Telephones*, Report on the Status of Implementation of the Commission's Hearing Aid Compatibility Requirements, 22 FCC Rcd 17709, 17719, para. 20 (2007) (noting, just four years later, that the number of individuals with hearing loss in the United States was “at an all time high of 31 million people – with that number expected to reach approximately 40 million people at the end of [2010]”).

<sup>26</sup> See *NAL*, 25 FCC Rcd at 17826, para. 11.

<sup>27</sup> See *id.* at 17827–28, paras. 13–14.

<sup>28</sup> We are also unpersuaded by Indigo Wireless's suggestion that the forfeiture penalty proposed was inconsistent with precedent. See *NAL* Response at 8–9. The cases cited by Indigo Wireless as evidence that the proposed forfeiture is excessive are inapposite to the facts in the instant case. Indigo Wireless failed to meet the required deployment benchmark by two handset models, which resulted in the assessment of a proposed base forfeiture of \$30,000. *NAL*, 25 FCC Rcd at 17827, para. 12. The cases cited by Indigo Wireless, however, involved service providers that failed to meet the required benchmark by only one handset model within the applicable statute of limitations and, therefore, proposed base forfeitures of only \$15,000. See *Epic Touch Co., Inc.*, Notice of Apparent Liability for Forfeiture, 25 FCC Rcd 17848, Appendix (Enf. Bur. 2010); *STI Prepaid, LLC*, Notice of Apparent Liability for Forfeiture, 25 FCC Rcd 17836, 17840, para. 7 (Enf. Bur. 2010).

<sup>29</sup> See *NAL* Response at 9–10.

Rules, we take into account both prior and concurrent violations, including violations occurring outside the statute of limitations, as well as the *duration* of each such violation.<sup>30</sup> In light of the fact that Indigo Wireless failed to offer to consumers the requisite number of digital wireless hearing aid-compatible handset models for nine months of the reporting period, we do not believe that Indigo Wireless can be said to have a history of overall compliance with the Commission's rules and, therefore, no reduction of the forfeiture based on this factor is warranted.<sup>31</sup> We also reject Indigo Wireless's suggestion that because it made a good-faith effort to comply, we should downwardly adjust the forfeiture.<sup>32</sup> As discussed above, Indigo Wireless's overall efforts to comply with the rules were insufficient. Further, any good-faith effort to comply with the hearing-aid compatibility rules is expected and generally does not serve to mitigate a forfeiture.<sup>33</sup>

9. Finally, Indigo Wireless's claim of "financial hardship" also does not support cancellation or reduction of the forfeiture.<sup>34</sup> Any claim of inability to pay must specifically identify the basis for the claim by reference to financial documentation submitted.<sup>35</sup> In general, an individual's or entity's "gross revenues are the best indicator of its ability to pay a forfeiture."<sup>36</sup> Indigo Wireless, however, has not provided any financial or other documentation to support or corroborate its claim of financial hardship.<sup>37</sup> We therefore deny the request for cancellation or reduction on this basis.

10. Based on the record before us and in light of the applicable statutory factors, we hereby affirm our conclusion in the *NAL* that Indigo Wireless willfully and repeatedly violated Section 20.19(c)(3)(ii) of the Rules by failing to offer the required number or percentage of digital wireless handset models that met or exceeded the radio frequency interference standards for hearing aid compatibility set forth in Section 20.19(b)(1) of the Rules.<sup>38</sup> We also decline to cancel or reduce the \$39,000 forfeiture proposed in the *NAL*.

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<sup>30</sup> See, e.g., *Roadrunner Transp. Inc.*, Forfeiture Order, 15 FCC Rcd 9669, 9671–72, para. 8–9 (2000) (duration and prior violations, even violations outside of the statute of limitations, are aggravating factors when considering the forfeiture amount). See also *Paulino Bernal Evangelism*, Memorandum Opinion and Order, 21 FCC Rcd 9532, 9536, para. 12 (Enf. Bur. 2006) (in determining whether a licensee has a history of overall compliance, offenses need not be "prior" to be considered), *review granted in part, denied in part*, Order on Review, 23 FCC Rcd 15959 (2008); *TV 45 Productions, Inc.*, Forfeiture Order, 17 FCC Rcd 11259, 11261, para. 8 (Enf. Bur. 2002) (*TV 45 Productions*) ("[T]he Commission has considered the duration of a violation in considering whether a licensee has a history of overall compliance.").

<sup>31</sup> See, e.g., *Commercial Radio Serv. Corp.*, 16 FCC Rcd 3543, 3545, para. 7 (Enf. Bur. 2001) (denying a reduction for a history of overall compliance where the licensee operated specialized mobile radio stations without authorization for five months); *TV 45 Productions*, 17 FCC Rcd at 11261, para. 8 (denying a reduction for a history of overall compliance where licensee operated without EAS equipment for approximately one year even though licensee had not previously violated the Rules).

<sup>32</sup> See *NAL* Response at 9–10.

<sup>33</sup> See *Forfeiture Policy Statement*, 12 FCC Rcd at 17099, para. 22 ("[t]he Commission expects [each licensee], and it is each licensee's obligation, to know and comply with all of the Commission's rules").

<sup>34</sup> *NAL* Response at 10.

<sup>35</sup> As stated in the *NAL*, the Commission will not consider a claim of inability to pay unless the petitioner submits "(1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices; or (3) some other reliable and objective documentation that accurately reflects the petitioner's current financial status." 25 FCC Rcd at 17829, para. 19.

<sup>36</sup> *PJB Commc'ns of Va., Inc.*, Memorandum Opinion and Order, 7 FCC Rcd 2088, 2089, para. 8 (1992).

<sup>37</sup> See, e.g., *Bureau D'Electronique Appliquee, Inc.*, Forfeiture Order, 20 FCC Rcd 17893, 17899–900, para. 19 (Enf. Bur. 2005) (denying inability to pay claim because company failed to provide supporting financial documentation).

<sup>38</sup> 47 C.F.R. §§ 20.19(c)(3)(ii); 20.19(b)(1).

#### IV. ORDERING CLAUSES

11. Accordingly, **IT IS ORDERED** that, pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Sections 0.111, 0.311, and 1.80 of the Commission's rules,<sup>39</sup> Indigo Wireless, Inc. **IS LIABLE FOR A MONETARY FORFEITURE** in the amount of thirty-nine thousand dollars (\$39,000) for willful and repeated violation of Section 20.19(c)(3)(ii) of the Commission's rules.<sup>40</sup>

12. Payment of the forfeiture shall be made in the manner provided for in Section 1.80 of the Commission's rules within thirty (30) calendar days after the release date of this Forfeiture Order.<sup>41</sup> If the forfeiture is not paid within the period specified, the case may be referred to the U.S. Department of Justice for enforcement of the forfeiture pursuant to Section 504(a) of the Communications Act of 1934, as amended.<sup>42</sup> Indigo Wireless, Inc. shall send electronic notification of payment to Jason A. Koslofsky at Jason.Koslofsky@fcc.gov, Pamera Hairston at Pamera.Hairston@fcc.gov, and Samantha Peoples at Sam.Peoples@fcc.gov on the date said payment is made.

13. The payment must be made by check or similar instrument, wire transfer, or credit card, and must include the NAL/Account Number and FRN referenced above. Indigo Wireless, Inc. shall send electronic notification of payment to Pamera Hairston at Pamera.Hairston@fcc.gov, Jason Koslofsky at Jason.Koslofsky@fcc.gov, and Samantha Peoples at Sam.Peoples@fcc.gov on the date said payment is made. Regardless of the form of payment, a completed FCC Form 159 (Remittance Advice) must be submitted.<sup>43</sup> When completing the FCC Form 159, enter the Account Number in block number 23A (call sign/other ID) and enter the letters "FORF" in block number 24A (payment type code). Below are additional instructions Indigo Wireless, Inc. should follow based on the form of payment it selects:

- Payment by check or money order must be made payable to the order of the Federal Communications Commission. Such payments (along with the completed Form 159) must be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000, or sent via overnight mail to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101.
- Payment by wire transfer must be made to ABA Number 021030004, receiving bank TREAS/NYC, and Account Number 27000001. To complete the wire transfer and ensure appropriate crediting of the wired funds, a completed Form 159 must be faxed to U.S. Bank at (314) 418-4232 on the same business day the wire transfer is initiated.
- Payment by credit card must be made by providing the required credit card information on FCC Form 159 and signing and dating the Form 159 to authorize the credit card payment. The completed Form 159 must then be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000, or sent via overnight mail to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101.

14. Any request for making full payment over time under an installment plan should be sent to: Chief Financial Officer—Financial Operations, Federal Communications Commission, 445 12th Street, S.W., Room 1-A625, Washington, DC 20554.<sup>44</sup> If Indigo Wireless, Inc. has questions regarding

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<sup>39</sup> 47 U.S.C. § 503(b); 47 C.F.R. §§ 0.111, 0.311, 1.80.

<sup>40</sup> 47 C.F.R. § 20.19(c)(3)(ii).

<sup>41</sup> *See id.* § 1.80.

<sup>42</sup> 47 U.S.C. § 504(a).

<sup>43</sup> An FCC Form 159 and detailed instructions for completing the form may be obtained at <http://www.fcc.gov/Forms/Form159/159.pdf>.

<sup>44</sup> *See* 47 C.F.R. § 1.1914.

payment procedures, it should contact the Financial Operations Group Help Desk by phone, 1-877-480-3201, or by e-mail, [ARINQUIRIES@fcc.gov](mailto:ARINQUIRIES@fcc.gov).

15. **IT IS FURTHER ORDERED** that a copy of this Forfeiture Order shall be sent by first class mail and certified mail, return receipt requested, to Indigo Wireless, Inc., 18 Beechnut Terrace, Ithaca, NY 14850; and to James M. Smith, Davis Wright Tremaine LLP, counsel to Indigo Wireless, Inc., 1919 Pennsylvania Avenue N.W., Suite 800, Washington, DC 20006-3401.

FEDERAL COMMUNICATIONS COMMISSION

Travis LeBlanc  
Acting Chief  
Enforcement Bureau